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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

OHIO-SEALY MATTRESS MANUFACTURING COMPANY, et al.,

Petitioners,

v.

SEALY, INCORPORATED, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Is Sealy's horizontal allocation of exclusive manufacturing territories unlawful *per se* under Section 1 of the Sherman Act?

(Discussed *infra*, pp. 4–6)

2. Does the second clause of the Seventh Amendment require that a district court exercise its power under Rule 54(b) of the Federal Rules of Civil Procedure to correct on remand a remittitur which has been held erroneous on appeal?

(Discussed *infra*, pp. 6–7)

3. Does Rule 54(c) of the Federal Rules of Civil Procedure require that money damages be awarded in this case with respect to any injuries suffered during the period which elapsed between the 1975 jury verdict for plaintiffs and the 1981 award of injunctive relief?

(Discussed *infra*, pp. 7–8)

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Ohio-Sealy Mattress Manufacturing Company and its subsidiaries[1] pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 669 F.2d 490, and is set forth commencing at page A1 of the Appendix hereto. The order of the Court of Appeals requiring respondents to answer Part I of petitioners' Petition for

[1]Petitioners' statements pursuant to Supreme Court Rules 21.1(b) and 28.1 are set forth in the Appendix hereto at page A232.

Rehearing and Suggestion of Rehearing In Banc (the substantive antitrust issue) is set forth at page A13. The order of the Court of Appeals denying the Petition for Rehearing and Suggestion of Rehearing In Banc is set forth at page A14.

Petitioners have also appended to their petition certain orders and opinions, and the record of certain proceedings, in this case and related cases. This Court's opinion in *United States* v. *Sealy, Inc.*, is reported at 388 U.S. 350. The Court of Appeals' opinion on the first appeal of this case is reported at 585 F.2d 821. The decisions of the district court for the Northern District of Illinois in the related cases are reported at 346 F. Supp. 353, 90 F.R.D. 11 and 486 F. Supp. 1047. None of the other opinions or orders set forth in the Appendix has been reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on January 29, 1982. A petition for rehearing and suggestion for rehearing in banc was denied on June 3, 1982, and this petition for certiorari was filed within 90 days of that date. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal. . . ."

The Seventh Amendment to the Constitution of the United States of America provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Rule 54(c) of the Federal Rules of Civil Procedure provides in pertinent part:

> "(c) *Demand for Judgment* . . . Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled . . . ."

STATEMENT OF THE CASE

In 1967, twenty-nine days after this Court's decision in *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967) (Appendix, A157) the licensee-directors of Sealy, Inc. ("Sealy") met to discuss--in the words of Sealy's Corporate Secretary—"ways and means to get around the Supreme Court ruling in such a way as to be able to retain the territorialization." Thereafter Sealy developed more subtle means of allocating markets and took steps to coerce reluctant licensees to accept those means. See *Sealy Mattress Company of Southern California* v. *Sealy, Inc.*, 346 F. Supp. 353, 357 (N.D. Ill. 1972) (Appendix, A170, A175).

In 1971 petitioners ("Ohio") filed this private antitrust action. Although the primary relief sought by Ohio was injunctive relief, Sealy demanded a jury and filed a counterclaim which required that Ohio's suit be tried by jury. In 1975, after a four-month trial, the jury returned verdicts in favor of Ohio on both the complaint and the counterclaim. In 1976 the district court denied Sealy's motion for a new trial on the condition that Ohio remit half of the $20.4 million judgment (Appendix, A15). In 1977 the district court refused to grant Ohio any equitable relief whatsoever (Appendix, A32). Ohio then appealed the denial of equitable relief and Sealy cross-appealed from the underlying jury verdict.

In 1978 the Court of Appeals for the Seventh Circuit upheld the jury verdict and reversed the denial of equitable relief. *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, 585 F.2d 821 (7th Cir. 1978) (Appendix, A51). In the course of its opinion, the Court of

Appeals held that the jury verdict had been "unnecessarily halved" (585 F.2d at 843; Appendix, A93). This Court denied Sealy's petition for certiorari (440 U.S. 930).

In 1979, on remand, the district court refused to restore the "unnecessarily halved" jury verdict and refused to hold a hearing regarding the damages incurred by Ohio-Sealy after the 1975 jury verdict (Appendix, A100). In 1981 the district court entered a final judgment which enjoined several of Sealy's restraints but which did not enjoin Sealy's system of exclusive manufacturing territories (Appendix, A124, A156). Ohio appealed and Sealy filed a contingent cross-appeal which again challenged the underlying jury verdict.

In late January, 1982, the Court of Appeals for the Seventh Circuit affirmed the district court's rulings in all respects and dismissed Sealy's contingent cross-appeal. *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, 669 F.2d 490 (7th Cir. 1982) (Appendix, A1). In February Ohio petitioned for rehearing and Sealy was ordered to answer Ohio's first point—exclusive manufacturing territories (Appendix, A13). Sealy answered in early March and Ohio's petition was denied on June 3, 1982 (Appendix, A14).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Presents An Antitrust Question Of Unusual Importance Which Has Never Been Addressed By This Court—The *Per Se* Unlawfulness Of Horizontal Allocations Of Exclusive Manufacturing Territories.

The antitrust issue presented is one of unusual importance because the decision below adds a new dimension to antitrust analysis under Section 1 of the Sherman Act: certain horizontal non-price restrictions—such as allocation of sales markets—are subject to the *per se* rule, but others are not. No prior decision of this Court supports such distinctions among horizontal non-price restraints.

As interpreted by Sealy, the Sealy license agreement prohibits any Sealy licensee from manufacturing Sealy products outside an assigned "Area of Primary Responsibility." Ohio attacked this restriction as *per se* unlawful, but the Court of Appeals held that the district court was required to enjoin its enforcement "*only* if necessary to prevent future allocation of sales markets" (669 F.2d at 496; Appendix, A12; emphasis supplied). Indeed, the Court of Appeals went on to say that it was sufficient that the district court's decree "opened the market to permit at least 'significant intrabrand competition among neighboring licensees,'" even though it acknowledged that "permitting Sealy to enforce the exclusive manufacturing clause may prevent Ohio from competing effectively in every APR" (*id.*).[2] The Court of Appeals thus concluded that a horizontal allocation of sales markets is *per se* unlawful under the Sherman Act, but that other horizontal restraints—including at least the restraint presented here—are not *per se* unlawful.

In *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977), however, this Court indicated that no such distinctions should be drawn. In *Sylvania*, this Court concluded that vertical non-price restrictions should be scrutinized under the rule of reason, but that vertical price restraints, together with horizontal price and non-price restraints, would remain subject to the rule of *per se* illegality. Indeed, this Court expressly warned against confusing vertical non-price restrictions with restrictions originating in agreements among competitors competing at the same level of the market structure, stating, "[t]here is no doubt that restrictions in the latter category would be illegal *per se*" (433 U.S. at 58 n.28).[3]

[2]In fact, as Sealy graphically admitted in a map it provided to the Court of Appeals (See A231), Sealy's exclusive manufacturing territories preclude Ohio from competing with Sealy itself or other Sealy licensees in approximately *half of the United States*. See also *Ohio-Sealy Mattress Mfg. Co.* v. *Duncan*, 486 F. Supp. 1047, 1060 n.36 (N.D. Ill. 1980) (Appendix A183, A204 n.36).

[3]This Court cited the following decisions in support of its statement: *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966) and *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972).

More recently, in *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980), this Court's *per curiam* decision specifically reaffirmed that horizontal price restraints are *per se* unlawful even if the specific practice in question may be absolutely "harmless in a particular set of circumstances" (*id.* at 649).

And in *Arizona* v. *Maricopa County Medical Society*, 102 S. Ct. 2466 (1982), this Court devoted virtually its entire opinion to reasserting its "adherence" to the *per se* rule (102 S. Ct. at 2478).[4] In *Maricopa*, as in *Sylvania*, this Court specifically relied upon *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972), a decision "applying the *per se* rule to invalidate the restrictive practice" even though this Court might have reached a contrary result under the rule of reason (102 S. Ct. at 2473 n.16).[5]

The Court of Appeals' departure from the established taxonomy of *per se* rules should be reviewed by this Court.

2. The Decision Below Presents A Question Under The Seventh Amendment Which Has Not Been, But Should Be, Decided By This Court.

In *Dimick* v. *Schiedt*, 293 U.S. 474 (1935), this Court pointed out that remittitur orders are of questionable fairness and doubtful constitutionality under the Seventh Amendment, but the practice was permitted on the ground that a remittitur merely excises an "excrescence" from the jury's verdict. In the instant case the remitted $10.2 million was not an "excrescence" and the district court's remittitur order deprived Ohio of its rights under the Seventh Amendment. The only question is whether there is an

[4] "Our adherence to the *per se* rule is grounded not only on economic prediction, judicial convenience, and business certainty, but also on a recognition of the respective roles of the Judiciary and the Congress in regulating the economy. *United States* v. *Topco Associates, Inc.*, *supra*, at 611–612."

[5] *Topco* was squarely premised on this Court's decision in *United States* v. *Sealy, Inc.* See 405 U.S. at 609.

insuperable procedural obstacle which prevents a court of review from correcting the district court's unconstitutional action.

The Court of Appeals purported to find such an obstacle in *Donovan* v. *Penn Shipping Co., Inc.*, 429 U.S. 648 (1977).[6] *Donovan* merely held that a plaintiff who has accepted a remittitur "may not appeal" (429 U.S. at 650),[7] but the Court of Appeals interpreted *Donovan* as creating an "estoppel rule" which applies to remands as well as to appeals. This "estoppel rule" was then applied to deny Ohio's appeal from the district court's refusal to exercise its powers under Rule 54(b) and correct on remand a remittitur that had already been found erroneous on the prior appeal (669 F.2d at 493; Appendix, A6).

Donovan did not alter the constitutional principle stated in *Dimick*, nor did it create a new procedural barrier to the protection of Seventh Amendment rights. The Court of Appeals' extension of *Donovan* in such a way as to obviate *Dimick* and thus deprive Ohio of its rights under the second clause of the Seventh Amendment should be reviewed.

3. The Court Of Appeals Has Sanctioned A Departure From The Obligation Of A Federal District Court To Provide Complete Relief Under Rule 54(c) Of The Federal Rules Of Civil Procedure.

Rule 54(c) of the Federal Rules of Civil Procedure provides that "every final judgment *shall* grant the relief to which the party in whose favor it is rendered is entitled . . ." (Rule 54(c), Fed. R.

[6]The Court of Appeals also suggested that the mandate in its prior decision precluded the district court from reinstating the jury's verdict. *But cf. Perkins* v. *Standard Oil Co.*, 399 U.S. 222 (1970). This Court is not bound by the Court of Appeals' later interpretation of its own mandate. *See Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 379 (1965).

[7]The purpose of the rule announced in *Donovan* was to promote "the interest in judicial administration" by "treating orders of remittitur as interlocutory and therefore unappealable," because otherwise, "a plaintiff would have nothing to lose by accepting a remittitur . . . and then proceeding to the court of appeals" (*Donovan* v. *Penn Shipping Co., Inc.*, 536 F.2d 536, 537 (2d Cir. 1976), *aff'd*, 429 U.S. 648 (1977)).

Civ. P.; emphasis supplied). The Court of Appeals held, however, "that to the extent Ohio has any valid causes of action against Sealy for . . . [supplemental] damages, Ohio is *required* to seek their recovery in another lawsuit" (669 F.2d at 494; Appendix, A8; emphasis supplied). The Court of Appeals' holding is impossible to reconcile with Rule 54(c) or with the historic obligation of the federal courts prior to the merger of law and equity. See *Greene* v. *Louisville & Interurban Railroad Company*, 244 U.S. 499, 520 (1917); *Gulbenkian* v. *Gulbenkian*, 147 F.2d 173, 176 (2d Cir. 1945). See also *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959).

The Court of Appeals cited no authority for its holding and the authorities which do exist—including a decision in the same Circuit—are to the contrary. In *Sundstrand Corp.* v. *Standard Kollsman Industries, Inc.*, 488 F.2d 807 (7th Cir. 1973), the Court of Appeals held that the district court, after having denied equitable relief, should have gone on and conducted a hearing on damages, because:

> "If the case is dismissed with prejudice, a subsequent suit for damages would be barred by res judicata. This certainly fails to comport with Rule 54(c) . . ." (*id.* at 815).

In this case, the Court of Appeals did the opposite: it required Ohio to seek a damage remedy in other lawsuits and it compounded this error by suggesting in *dicta* that at least some of the relief sought by Ohio would be barred by *res judicata* (669 F.2d at 494–95; Appendix, A5 to A8).

Rule 54(c) *mandates* complete relief in a single action, but the Court of Appeals expressly "held" that Ohio is "required" to seek relief in a separate action where at least part of Ohio's supplemental damages may be barred by the doctrine of *res judicata*. See *Ohio-Sealy Mattress Mfg. Co.* v. *Kaplan*, 90 F.R.D. 11, 14–19 (N.D. Ill. 1980) (Appendix, A212, A216 to A226). Such a clear departure from the express words of Rule 54(c)—and such an obviously unjust result—casts a shadow on the Federal Rules, a shadow which this Court should remove.

CONCLUSION

After more than eleven years of litigation in which it proved a hard core antitrust violation, Ohio has not been made whole and has not been freed of a serious and unlawful restriction on its ability to compete. This Court should grant Ohio's petition and decide each of the questions presented.

Respectfully submitted,

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